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No. 91-1267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

B.J. ALAN COMPANY, INC., OLDE GLORY MARKETING, LIMITED, NEPTUNE FIREWORKS COMPANY, INC. AND CONSIGNED SALES COMPANY, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

On Petition For A Writ Of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

1. The federal respondents and UPS note in their responses that this petition does not ask the Court to resolve a conflict among the circuits. That is correct. The petition asks the Court to correct a miscarriage of justice by requiring the Interstate Commerce Commission (ICC) to follow this Court's cases interpreting the common-carrier service obligation embodied in the Interstate Commerce Act (49 U.S.C. § 11101(a)). Here, the ICC relied on "agency discretion" to overturn this Court's longstanding interpretations of that obligation. Recently, however, this Court has made it clear that such agency "lawmaking" will no longer be tolerated. Thus, the petition asks the Court to see that the four petitioning shippers — and all similarly situated shippers — are not driven out of business by the illegal deregulatory designs of the ICC.

2. In our petition, we explained that this Court's decision in *Maislin Industries. U.S. v. Primary Steel Inc.*, 110 S. Ct. 2759

(1990), wholly undermined the ICC's decision in this case. The ICC's decision purported to "reinterpret" Section 11101(a) of the Interstate Commerce Act (49 U.S.C.), which contains the common-carrier service obligation. The ICC justified its reinterpretation of the statute on the same two grounds that it set forth in *Maislin* to justify its "reinterpretation" of the filed-rate doctrine — *i.e.*, judicial deference to an agency's interpretation of its governing statute, and the deregulatory purposes of the Motor Carrier Act of 1980 (1980 Act). *See* Pet. App. 13a, 42a, 48a; 897 F.2d at 563-64. This Court in *Maislin*, rejecting the arguments of the ICC and the United States, held that neither ground permits the Commission's deviation from settled interpretations of those portions of the Interstate Commerce Act which the 1980 Act did not amend. *See* 110 S. Ct. at 2768, 2770. The 1980 Act did not amend the common-carrier obligation any more than it amended the filed-rate doctrine at issue in *Maislin*; it follows, therefore, that *Maislin* repudiated the Commission's rationales in this case. Hence, *Maislin* is plainly a "changed circumstance" permitting judicial review of the ICC's decision.

The court of appeals did not disagree with the point that *Maislin* undermined the ICC's reasoning in this case. Rather, the court of appeals held that *Maislin* was anticipated by the Supreme Court's prior decision in *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986). *See* Pet. App. 3a. The federal respondents and UPS do not attempt to defend that analysis, which is illogical. Even if (as the court of appeals necessarily implied) the parties should have known that *Square D* precluded the ICC's new interpretation of the Interstate Commerce Act, the ICC did **not** know that *Square D* had such force. Indeed, in its decision underlying *Maislin*, the ICC rejected the contention that *Square D* had anything to do with its power to reinterpret the Act. The ICC wrote that *Square D* does not concern "an agency's right to interpret or reinterpret its own statute." *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623, 634

n.29 (1989) (Negotiated Rates II). At the very least, therefore, *Maislin* was a "changed circumstance" in the sense that this Court educated the ICC on the limits of its power to deviate from settled interpretations of the Act.

The Solicitor General invents a new justification for the court of appeals' decision. He argues (Br. in Op. 6-7) that *Maislin* really announced no new legal principles nor resolved any unclear matter of law. That is a remarkable suggestion in light of the fact that this Court in *Maislin* rejected the Solicitor General's two main legal positions. In particular, the Court rejected the Solicitor General's plea on behalf of the ICC for "deference." *See* 110 S. Ct. at 2768. The Court wrote: "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Ibid.* Moreover, this Court rejected the Solicitor General's claim that the 1980 Act justified the ICC's reinterpretation. Those two aspects of the *Maislin* opinion completely undermine the ICC's decision in this case.

The Solicitor General contends (Br. in Op. 7) that this case does not fall within the limits on "reinterpretations" imposed by *Maislin* because the statutory command in Section 11101(a) is broad, indicating a grant of discretionary authority to the agency. This Court's recent decision in *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992), however, refutes that contention. In *Lechmere*, this Court reviewed the National Labor Relations Board's interpretation of Section 7 of the National Labor Relations Act. Section 7 is written in broad terms that protect employees' rights to self-organize. The NLRB noted the broad language of Section 7 and claimed that it was "entitled to judicial deference when it interprets an ambiguous provisions of a statute it administers." 112 S. Ct. at 847. This Court rejected the NLRB's claim for deference. The Court stated: "Before we reach any

issue of deference to the Board, . . . we must first determine whether [the Board's decision] is consistent with our past interpretations of § 7." 112 S. Ct. at 847 (relying on *Maislin*). And the Court held that the NLRB's new interpretation of Section 7 was not consistent with prior precedent. Here, petitioners simply request that same type of judicial review — a comparison of the ICC's decision with the prior decisions of this Court.[1]

To date, no reviewing court has ever taken a proper look at the ICC's "reinterpretation" of Section 11101(a). That is to say, no court has compared the ICC's decision with the holdings of this Court. When this case was on judicial review before *Maislin*, the court of appeals simply gave the ICC sweeping discretion to reinterpret the Interstate Commerce Act. *See B.J. Alan Co. v. ICC*, 897 F.2d 561, 564 (D.C. Cir. 1990). We now know from *Maislin* (and *Lechmere)* that such deference is inappropriate. But when this case came back to the court of appeals after *Maislin*, that court again refused to look at the ICC's decision in light of the decisions of this Court. That refusal to look may be justified (if at all) only on the ground that the ICC's reinterpretation is consistent with this Court's constructions of the Interstate Commerce Act.

Accordingly, the procedural posture of this case does nothing to hinder this Court's review of the vital substantive issue presented — *i.e.*, whether the ICC's reinterpretation of the common-carrier service obligation in Section 11101(a) is consistent with prior Supreme Court constructions of that provision. In fact, the ICC recognized as much when it refused to reopen

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[1] Contrary to the Solicitor General's suggestion (Br. in Opp. 6 n.7), *National R.R. Passenger Corp. v. Boston & Maine Corp.*, No. 90-1419, 60 U.S.LW 4268, 4270 (U.S. Mar. 25, 1992), does not restore the ICC's claimed discretion to reinterpret an unamended statute with a long history of contruction by this Court, such as § 11101(a). *National R.R. Passenger Corp.* reviewed "the first decided case involving Amtrak's condemnation powers under [45 U.S.C.] § 562(d)"; 60 LW at 4269. Indeed, the condemnation statute was amended *pendente lite*; *id.* at 4270.

the proceeding. The Commission wrote that its new interpretation of Section 11101(a) did not "conflict with the governing statute or with Supreme Court precedent." Pet. App. 13a. Likewise, UPS attempts to defend the ICC's refusal to reopen by stating that "the Commission . . . correctly applied relevant Supreme Court precedent." Br. in Op. 7. Those bald assertions by the Commission and UPS are at the heart of this case. Petitioners ask the Court to examine those statements, because they are plainly wrong. *See* Pet. at 12 n. 6; 13-17.

3. This case turns on the merits of the Solicitor General's statement (Br. in Op. 7) that "petitioners cite no decision of this Court construing the 'reasonable request' requirement as narrowly as they suggest here." That statement is incorrect. We explained in our petition (pp. 13-17) that the ICC's action in this case was inconsistent with the previously settled meaning of the phrase "reasonable request" in Section 11101(a). In light of the Solicitor General's characterization of our petition, however, we will now more fully explain that point.

Prior to this proceeding, the common-carrier service obligation contained in the terms of Section 11101(a) had a settled core meaning. In *Michigan PUC v. Duke*, 266 U.S. 570 (1925), this Court described the common-carrier service obligation at common law: "One bound to furnish transportation to the public as a common carrier must serve all, up to the capacity of his facilities, without discrimination and for reasonable pay." *Id.* at 577. That legal rule was codified in Section 11101(a) of the Interstate Commerce Act. As the Supreme Court stated in *American Trucking Ass'n v. Atchison, T. & S. F. Ry.*, 387 U.S. 397 (1967), "[w]e begin by noting the obvious fact that the Interstate Commerce Act codified common-law obligations of . . . common carriers." *Id.* at 406 (referring to predecessor of Section 11101(a)). *See also Akron, Canton & Youngstown Railroad Co. v. ICC*, 611 F.2d 1162, 1166 (6th Cir. 1979) (recognizing that Act "codified the common-law obligations"

of common carriers and affirming ICC order requiring such carriers to haul nuclear materials). Hence, the courts have understood over the years that Section 11101(a) of the Interstate Commerce Act incorporates the *Duke* rule that a common carrier must "'serve all, up to the capacity of his facilities, without discrimination and for reasonable pay.'" *Steere Tank Lines, Inc. v. ICC*, 675 F.2d 103 (5th Cir. 1982) (*quoting Michigan PUC v. Duke, supra*). *Accord National Furniture Traffic Conference v. Associated Truck Lines*, 332 I.C.C. 802 (1968), *aff'd sub nom. Associated Truck Lines, Inc. v. United States*, 304 F. Supp. 1094 (W.D. Mich. 1969), *aff'd per curiam*, 397 U.S. 42 (1970).

In 1982, the ICC again acknowledged this well-settled interpretation of Section 11101(a). The Commission wrote:

> The Interstate Commerce Act, 49 U.S.C. 11101, requires that a common carrier providing service subject to the Commission's jurisdiction shall provide such service on reasonable request. The offering of service "upon reasonable request" has been interpreted by the Commission to mean that service must be offered on a nondiscriminatory basis to the full extent of the carrier's certificate of authority but only up to the limit of the carrier's equipment.

Small Community Service Study as Mandated by Section 28 of the Motor Carrier Act 25 (1982). Moreover, Congress has repeatedly adopted new legislation against the backdrop of this settled meaning of Section 11101(a). *See, e.g.*, S. Rep. 449, 101st Cong., 2d Sess. 17 (1990) ("the ICC has interpreted the railroad 'common carrier' obligation to require that railroads carry all commodities, even those which they may not wish to haul"); H.R. Rep. 1035, 96th Cong., 2d Sess. 57 (1980) (Staggers Rail Act) ("The Committee believes that the common carrier obligation must be retained to prevent railroads from having the ability to serve only their most profitable business").

In this case, the ICC abandoned that settled interpretation of Section 11101(a). It did not ask whether UPS has the present ability to carry petitioners' goods. It did not ask whether UPS was receiving "reasonable pay" for such shipments within the meaning of *Duke, supra*. Rather, the ICC adopted a simple rationality test — *i.e.*, can the carrier give a plausible reason for its decision? *See* Pet. App. 44a n.15, 44a-47a. That test is inconsistent with the previously settled meaning of Section 11101(a). Once that point is understood, it necessarily follows from *Maislin* that the ICC's decision cannot stand.

In support of the Commission's "reinterpretation," UPS (Br. in Op. 6) and the Solicitor General (Br. in Op. 7 n.10) rely exclusively on a sentence fragment in *Pennsylvania Railroad Co. v. Puritan*, 237 U.S. 121, 133 (1914) — *i.e.*, "the law only exacts what is reasonable from [ ] carriers." That statement is true and beside the point. Section 11101(a), as interpreted by the courts and understood by Congress in light of the *Duke* criteria, provides that **it is reasonable**, as a matter of law, to require a common carrier to accept shipments that it is able to carry at a profit. Indeed, the Supreme Court in *Puritan* noted that a shipper is entitled to all railroad cars that it can promptly load; that right is subject only to a sudden and unexpected demand on the railroad so that the carrier cannot physically handle all requests. Thus, *Puritan* gives no support to the ICC's "reinterpretation."

4. The logic of respondents is also faulty. Following the lead of the Commission (Pet. App. 12a), UPS notes that the common-carrier service obligation "is not absolute." Br. in Op. 6. UPS then argues that the ICC's reinterpretation of that obligation in Section 11101(a) is therefore justified. Such a conclusion, however, does not follow from the premise.

Of course there are limits to the common-carrier obligation. There are limits to all obligations. The filed-rate doctrine, at issue in *Maislin*, has its limits. *See* 110 S. Ct. at 2767 n.10.

Similarly, the common-carrier obligation has limits. For example, a carrier would probably not be required under the "capacity of his facilities" principle of *Duke* to buy costly new equipment to meet the peculiar needs of one shipper. Nor would a carrier be required to suffer long-term losses caused by the peculiar needs of a unique shipper. But this case does not concern the outer limits of Section 11101(a). This case fits within the core meaning of a "reasonable request," as that phrase has been construed by this Court. UPS has the present ability to meet petitioners' request, and UPS will earn a profit by doing so.[2]

5. UPS suggests (Br. in Op. 6) *Maislin* is inappropriate because the 1980 Act provides a basis for the ICC's reinterpretation of the common-carrier service obligation. UPS cites no authority for that point and there is none.[3] As we explained in our petition (pp. 16-17), the sponsors of the 1980 Act were careful to note that their bill did not change the common-carrier obligation. The ranking minority member of the House Subcommittee on Surface Transportation observed, "I emphasize that this bill keeps the common carrier obligation to serve. It does not touch that. It keeps that. And that is fundamental." 126 Cong. Rec. 15592 (1980) (statement of Rep. Shuster).

6. UPS next notes that petitioners have pointed to no statutory provision indicating a "'specific congressional intention to overturn' the Court's longstanding interpretation of the common carrier obligation." Br. in Op. 7-8 (quoting *Square D*, 476 U.S. at 422). That is precisely the point. In this case, the ICC — not Congress — overturned the common-carrier service obligation contained in Section 11101(a). The ICC did so

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[2] UPS' subsequent imposition of a surcharge to cover the costs of handling other hazardous materials repudiates the ICC's "operationally impracticable" finding and further demonstrates the discrimination against petitioners.

[3] The Solicitor General does not expressly rely on the 1980 Act.

before *Maislin* when it believed that it had broad discretion to reinterpret the Act. In light of *Maislin*, the ICC's "creative" reinterpretation, which conflicts with the settled meaning of the statute, cannot stand.

7. In the end, the Solicitor General and UPS attempt to portray the certiorari petition as a stale attempt to resurrect an old case.[4] UPS and the ICC plainly want to avoid the scrutiny of serious judicial review, because the ICC's "reinterpretation" of the Act cannot be justified. When the court of appeals heard this matter before *Maislin*, the court wrote one sentence explaining the court's rejection of petitioners' statutory argument. *See* 897 F.2d at 564. The court of appeals did not even mention this Court's prior interpretations of the common-carrier service obligation. Such deference to the ICC is no longer appropriate in light of *Maislin*. If a court looks seriously at the statutory service obligation of common carriers, it must hold that the ICC erred in rewriting that obligation out of the Act.

In that sense, the Solicitor General is correct in contending that petitioners are arguing that the ICC's substantive order displays "material error."[5] No request to reopen an agency

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[4] The Court should not be misled by UPS's statement (Br. in Op. 3) that petitioners "filed twelve pleadings with the ICC seeking to reopen." UPS is apparently referring to documents such as petitioners' "motion to strike" and "petition for waiver of rules"; petitioners did **not** file 12 separate petitions to reopen.

[5] The Solicitor General makes that point in order to fall within the holding of *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987). In *Brotherhood of Locomotive Engineers*, this Court determined that judicial review of a decision not to reopen is not available when a party seeks to reopen on the ground of "material error." This Court did recognize in *Locomotive Engineers*, however, that judicial review is available in light of changed circumstances. And all parties to this case agree that an intervening decision of this Court may qualify as a "changed circumstance." For the reasons expressed above, *Maislin* is such a case. Moreover, the Court reasoned in *Locomotive Engineers* that judicial review of a refusal to reopen

proceeding is justified unless the agency decision is wrong. But petitioners are saying more than that the ICC was wrong. Petitioners have shown that this Court's decision in *Maislin* completely undermined the ICC's reasoning. In other words, all parties now know that the ICC's decision is wrong. The ICC can no longer use its claim for "deference" and the 1980 Act as grounds for departing from the precedents of this Court. That was not known before *Maislin*.[6] It is now.

The ability of a whole class of shippers to survive is at stake. Accordingly, petitioners ask this Court to enter an order permitting serious judicial review. We suggest three options: (1) grant, vacate, and remand for judicial review of the merits in light of *Maislin*, (2) summary reversal, or (3) plenary review.

Respectfully submitted,

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based simply on the claim of "material error" would entail "*using the same standard of review that would have been applied had appeal been filed within the congressionally prescribed 60-day period*,170 482 U.S. at 281-82 (emphasis in original). That principle has no application in this case. This Court's decision in *Maislin* fundamentally changed the way that courts must review the ICC's "reinterpretations" of the Interstate Commerce Act.

[6] Before *Maislin*, petitioners could not justify the expense of a certiorari petition. The ICC's decision had devastated their businesses, and there appeared to be little hope for judicial redress.